No. 82-5306

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

BOBBY LEWIS SHAW,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE MISSOURI SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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Question Presented

1. Whether the Missouri form criminal instructions, which provide in capital cases that if non-statutory mitigating circumstances are supported by the evidence the jury is instructed that it may consider "any circumstances which you find from the evidence in extenuation or mitigation of punishment," violates petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution on the basis that the non-statutory mitigating circumstances are not specifically set out in the instruction.

2. Whether petitioner may raise a constitutional claim in this Court which was never presented to the Supreme Court of Missouri or to any other state court.

TABLE OF AUTHORITIES

Cases Cited

Eddings v. Oklahoma, 455 U.S. ___, 102 S.Ct. 860, 71 L.Ed.2d 1 (1982) 8, 9, 10, 11

Gregg v. Georgia, 428 U.S. 153 (1976)..... 8

Lockett v. Ohio, 438 U.S. 586 (1978) 8, 9, 11

Sandstrom v. Montana, 442 U.S. 510 (1979) 11

State v. Shaw, No. 62679 (Mo. banc August 2, 1982)..... 2, 3, 6

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Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied ___ U.S.___, 102 S.Ct. 2021 (1982) 9, 10

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Eighth Amendment, U.S. Constitution ..... i, 8

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MAI-CR2d 15.44 ..... 1, 5, 8

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CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the constitutional provisions cited by petitioner in his petition, the following other authorities are relevant to the issues presented herein.

1. Section 565.012.3, RSMo 1978, states as follows:

> "Statutory mitigating circumstances shall include the following:
>
> (1) The defendant has no significant history of prior criminal activity;
>
> (2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;
>
> (3) The victim was a participant in the defendant's conduct or consented to the act;
>
> (4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;
>
> (5) The defendant acted under extreme duress or under the substantial domination of another person;
>
> (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
>
> (7) The age of the defendant at the time of the crime."

2. Missouri Approved Instructions-Criminal, Second Edition (hereinafter abbreviated "MAI-CR2d") 15.44 and the accompanying Notes on Use are attached to this response as Appendix A.

STATEMENT OF THE CASE

Petitioner Bobby Lewis Shaw was convicted of capital murder, § 565.001, RSMo 1978, and was sentenced to death for the fatal stabbing of a correctional officer while petitioner was an inmate at the Missouri State Penitentiary. Since the evidence of petitioner's guilt is fully set out in the opinion of the Missouri Supreme Court affirming his conviction and sentence, State v. Shaw, No. 62679 (Mo. banc., August 2, 1982) (petitioner's Appendix A), that evidence will not be stated here except as relevant to petitioner's constitutional claim.

The evidence bearing upon petitioner's present contention is as follows: the sole witness called by the defense at the guilt stage of trial was Dr. Sadishur Parwatikar, a psychiatrist for the Missouri Department of Mental Health who had conducted a psychiatric evaluation of petitioner (trial transcript--hereinafter "Tr."--at 411-413). The defense theory underlying the introduction of Dr. Parwatikar's testimony was that of "diminished mental capacity": that as a result of a "mental disease or defect" petitioner was incapable of forming the necessary intent (principally, premeditation and deliberation) to commit the crime of capital murder. See § 552.030.3, RSMo 1978. Dr. Parwatikar testified that petitioner had a tested I.Q. of approximately 73, within the borderline of mental retardation, and that persons with a low I.Q. are generally more susceptible to suggestion than persons with higher intelligence test scores (Tr. 413-415). However as to the effect of petitioner's intelligence level upon his ability to commit capital murder, Dr. Parwatikar testified without dispute or contradiction as follows:

"Q. Doctor, with the I.Q. that you stated the defendant had, would he be able to form the intention to kill another person?

A. Yes, sir, he could.

Q. Would he be able to know that he was practically certain to cause the death of another person if he stabbed them with a knife?

A. Yes, sir.

Q. Would he be able with his I.Q. to consider carefully and cooly, cold-bloodedly, upon taking the life of another person?

A. Yes, sir.

* * *

Q. (By Mr. Brown) Dr. Parwatikar, I want to repeat the last question again. Would the defendant with his I.Q. be capable of considering taking the life of another human being and reflecting upon that matter cooly, cold-bloodedly, before doing so?

A. Yes, sir, he can." (Tr. II 421-423).

At the close of the guilt phase of trial, petitioner did not request and the trial court did not submit to the jury an instruction on "diminished capacity" (Tr. 426-428); when petitioner claimed after his conviction that such an instruction should have been given, the Missouri Supreme Court cited the above-quoted testimony of Dr. Parwatikar in concluding that a diminished-capacity instruction was not supported by the evidence. State v. Shaw, supra, slip opinion at 8-9. Petitioner does not challenge this conclusion in the petition at bar.

Following petitioner's conviction of capital murder, the bifurcated hearing on punishment was held; at this hearing, the only additional evidence adduced by either party was the introduction by the state of certified copies of petitioner's prior convictions for murder, attempted

robbery and stealing (Tr. 474-475) and testimony that petitioner was in the custody of the Missouri State Penitentiary at the time of the present murder (Tr. 476-478). At the close of this evidence, the jury was instructed as to its duties and responsibilities in the punishment phase (Circuit Court's legal file--hereinafter "L.F."--at 24-30). The statutory aggravating circumstances submitted by the state were that the murder "was committed against a corrections employee while engaged in the performance of his official duty," § 565.012.2(8), RSMo 1978; and that "at the time of the murder of [the victim], the defendant was in lawful custody of a place of confinement," § 565.012.2(9) (L.F. 25). None of the statutory mitigating circumstances listed in § 565.012.3 were supported by the evidence.[1] The principal jury instruction on mitigating evidence was Instruction No. 19, which stated as follows:

> "If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 18, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murder of Walter Wayne Farrow.
>
> You may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment.

[1] Petitioner did seek a submission under § 565.012.3(5) that "the defendant acted under extreme duress or substantial domination of another person" (L.F. 33); however, as the trial court correctly noted (Tr. 471), this theory was utterly unsupported by evidence on the record. Petitioner does not complain of the court's ruling in his present petition.

If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence." (L.F. 27).

This instruction is in the form of MAI-CR2d (Missouri Approved Instructions-Criminal, Second Edition) 15.44 which is attached to this response as Appendix A. The MAI-CR2d instructions forms are promulgated by the Supreme Court of Missouri, and are required to used to the exclusion of all other instructions. Missouri Supreme Court Rule 28.02(c). Under MAI-CR2d 15.44, statutory mitigating circumstances must be specifically listed when they are supported by the evidence and, if any non-statutory mitigating circumstances are supported by the evidence the following language is inserted: "You may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment." MAI-CR2d 15.44, Notes on Use at note 5 (Appendix A). This language is contained in Instruction No. 19, above (L.F. 27). Petitioner did not request that any non-statutory mitigating circumstances be specifically listed in this instruction.

After the submission of instructions, the closing arguments as to punishment were made by the state and defense (Tr. 479-495). In his argument, the defense counsel made specific reference to petitioner's low intelligence score in arguing that the death penalty should not be imposed:

"A man -- you heard [Dr. Parwatikar], Dr. Sam we call him, the absolute bottom of the barrel, the lowest eight percent of the population in mentality, cosened into this senseless murder plot

by some superior inmate over the offer of a -- supposed offer of a ring. A man so devoid of the simplest things of life that something of that nature could convince him that he should accomplish something by that. It's incredible that you would now be asked to do what he is accused of, kill. And you alone can take the responsibility, no one else" (Tr. 495).

Thereafter, the jury returned a sentence of death (L.F. 19). On appeal to the Missouri Supreme Court, petitioner's counsel asserted for the first time that petitioner's low intelligence should have been specifically listed as a non-statutory mitigating circumstance in Instruction No. 19. This theory was rejected by the Missouri Supreme Court, State v. Shaw, supra, slip opinion at 8-9, and petitioner now advances the same contention in the petition at bar.

Summary of Argument

Petitioner principally argues that the instructions submitted to the jury at the punishment phase of trial with regard to mitigating circumstances violated his constitutional rights because they did not specifically refer to his particular theory of mitigation; the instruction on mitigating evidence advised the jury that "[y]ou may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment." The decisions of this Court require that the defendant be free to submit to the sentencing authority any evidence or theory which might serve to mitigate his crime. The challenged instruction does not in any manner infringe upon that right. Petitioner was not prevented or limited in any way in introducing mitigating evidence, he was permitted to (and did in fact) argue his theory of mitigation to the jury during the punishment phase, and the jury was explicitly instructed that it was permitted to consider this or any other mitigating factor which it found from the evidence.

Petitioner's remaining contention, that the instruction on mitigating circumstances was incorrect in stating that the jury "may" consider mitigating evidence, is advanced for the very first time in this certiorari petition, having not been raised in any Missouri court, and thus is not reviewable in this Court. In any event, the decisions of this Court do not stand for the proposition that the sentencing authority is required to consider any and all "mitigating" evidence that defendants may introduce, but only that the sentencer may not be precluded as a matter of law from considering such evidence if it so desires. The instructions in the present case did not limit in any manner the jury's right to consider any and all mitigating evidence.

Argument

Petitioner's principal theory in his certiorari petition is that the sentence of death imposed upon him constitutes "cruel and unusual punishment" under the Eighth and Fourteenth Amendments to the United States Constitution because his low intelligence scores were not specifically listed as a mitigating circumstance in Instruction No. 19 submitted to the jury (L.F. 27). Under MAI-CR2d 15.44, promulgated by the Missouri Supreme Court (see Appendix A), the mitigating circumstances listed in § 565.012.3, RSMo 1978, are set out in the instruction if supported by the evidence, and if any non-statutory mitigating circumstances are shown by the evidence, the instruction additionally states that "[y]ou may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment." That language is contained in Instruction No. 19.

It is beyond dispute that capital sentencing schemes must, in order to pass constitutional muster, permit "the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976); see Gregg v. Georgia, 428 U.S. 153, 189 (1976). As to the jury's consideration of mitigating evidence, this Court's holding is clear:

> "'[W]e conclude that the Eighth and Fourteenth Amendments require that the sentences...not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death'" (emphasis in original). Eddings v. Oklahoma, 455 U.S. ___, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978).

Neither the holdings of these decisions nor their underlying policy was violated in the present case. Petitioner was not restricted in any way in introducing mitigating evidence at the punishment stage of trial. Nor was the jury limited, implicitly or explicitly, as to what mitigating evidence it was permitted to consider--to the contrary, it was told that it could "consider any circumstances which you find from the evidence in extenuation of mitigation of punishment" (emphasis supplied; L.F. 27). It is absurd for petitioner to argue that the absence of a specific reference to his mitigation theory in the instruction somehow prevented the jury from properly considering it; not only did petitioner have the right to introduce evidence on his theory, but he was entitled to (and did in fact) argue it in detail to the jury.[2] In short, nothing whatsoever in the challenged instruction infringes upon the right of the defendant, protected by Eddings, Lockett and related cases, to place any and all mitigating theories before the sentencing authority. Eddings v. Oklahoma, supra, 102 S.Ct. at 874-875.

The absence of merit in petitioner's current theory is apparent in a comparision of the case at bar with Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied ___ U.S. ___, 102 S.Ct. 2021 (1982), cited by petitioner. In Washington, the jury was given instructions at the punishment stage which stated (or strongly implied) that they could consider only the mitigating circumstances specifically enumerated in the instruction. Id., 655 F.2d at 1367-1368. In holding that this instruction constructively violated Lockett v. Ohio, supra, the Court of Appeals pointed out that

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[2] Petitioner's reference to a portion of the state's closing argument as signifying to the jury that it could not consider petitioner's intelligence scores in deciding on punishment (petition at 5, 9), is frivolous and pretextual; the argument in question was made during the guilt stage of trial (see Tr. 452), and the prosecution neither stated nor implied that this or any other factor was beyond the jury's province in deciding on punishment.

> "nowhere in the trial court's charge to the jury in the sentencing phase of Washington's trial is there any explicit instructions that the jury was free to consider mitigating factors other than [those listed in the instruction]" (emphasis in original). Washington v. Watkins, supra, 655 F.2d at 1369.

In the present case, by contrast, the jury was specifically so advised; petitioner's complaint is simply that the instruction did not go into all of the detail that he would prefer. Absent the slightest reasonable argument that the instruction at issue somehow prevented the jury from considering the contention that petitioner's low intelligence mitigated his act of cold-blooded murder (or any other theory of mitigation that petitioner desired to raise), no legitimate basis exists for the issuance of a writ of certiorari in this case.

In addition to the above claim, petitioner advances an alternative theory: that Instruction No. 19 is defective because it advises the jury that it "may" consider any mitigating circumstances it finds from the evidence, and that this violates Eddings v. Oklahoma, supra, because it permits them to "ignore mitigating circumstances" (petition at 8-9). The principal difficulty with this claim is that it was never presented to any state trial or appellate court, but rather is raised for the very first time in this certiorari petition.[3] As this Court has noted:

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[3] Although this could be demonstrated by production of the state court records and briefs, it is also manifest from the fact that the present theory was not addressed in the opinion of the Missouri Supreme Court. Where "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary" (citations omitted). Street v. New York, 394 U.S. 576, 582 (1969).

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgement of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system" (citations omitted). Webb v. Webb, 451 U.S. 493, 496-497 (1981).

See also Sandstrom v. Montana, 442 U.S. 510, 527 (1979). Since neither the Supreme Court of Missouri nor any other state court has had the opportunity to pass upon petitioner's current theory, that theory is not properly reviewable here.

In any event, petitioner's theory is without merit. Eddings v. Oklahoma, supra, stands for the simple proposition that the sentencing authority cannot be restricted as to what mitigating factors it may be permitted to consider in imposing punishment; in Eddings, the sentencing judge made statements which this Court interpreted as signifying that he believed that he could not, as a matter of law, consider the defendant's violent and disturbed childhood in imposing punishment. Id., 102 S.Ct. at 873-875. However, this decision does not signify, as petitioner claims, that the sentencing "must consider all mitigating circumstances" (emphasis in original; petition at 8). Under Eddings and Lockett v. Ohio, supra, the defendant has a virtually unrestricted right to introduce any evidence which he thinks might somehow serve to mitigate his crime; if the defendant desired to adduce testimony as to his favorite color or his hat size, he apparently has a constitutional right to do so. Nothing in any decision of this Court, however, requires the sentences to give weight to such evidence; the Constitution simply "requires the sentencer to listen." Eddings v. Oklahoma, supra, 102 S.Ct. at 876 (n.10). Since instruction No. 19 does not in any manner restrict what the jury may consider in rendering its decision as to punishment, it is frivolous for petitioner to allege a constitutional violation here.

CONCLUSION

In view of the foregoing, the respondent respectfully submits that petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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